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No. 75-400

In the Supreme Court of the United States

OCTOBER TERM, 1975

MYRON DI NOVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of possessing, with the intent to distribute, about two-and-a-half pounds of a mixture containing heroin, in violation of 21 U.S.C. 841(a) (1). He was sentenced to 25 years' imprisonment, to be followed by 6 years' special parole; petitioner was also fined $25,000. The court of appeals affirmed (Pet. App. A).[1]

The undisputed evidence showed that federal narcotics agents searched petitioner's house-trailer pursuant to a warrant. Among petitioner's belongings, the agents found approximately two-and-a-half pounds of a mixture containing heroin, about $14,000 in cash, two scales, and other narcotics paraphernalia (Pet. App. A 2-3). The "street" value of the heroin was between $80,000 and $240,000, depending upon how it was packaged for sale (Tr. 240-241).

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[1]The court of appeals reversed the conviction of Janet Di Novo, petitioner's wife, because it found the evidence against her to be insufficient (Pet. App. A 6-8).

1. Petitioner contends that the search warrant affidavit was insufficient to establish probable cause that evidence would be found in his house-trailer. This contention was correctly rejected by the court of appeals after a careful review (Pet. App. A 3-6).

The affidavit, appended to the court of appeals' opinion (Pet. App. B 10-15), was sworn before a United States Magistrate by Agent Thomas H. Chown of the Drug Enforcement Administration ("DEA"). In his affidavit, Agent Chown relied primarily upon information supplied by named local police officers who were then cooperating with the DEA agents.[2] The affidavit was executed on February 1, 1974, and stated the following facts:

(a) that about three weeks earlier, a reliable informant had been in a house at 226 Highland St. with petitioner; that while there, the informant saw two bags which petitioner said contained heroin; that the informant said petitioner would have 30 pounds of heroin coming in from Mexico (Pet. App. B 11-12, para. 4A); that this informant had previously given assistance to a local officer in making an undercover purchase of narcotics and had given another local officer information resulting in several arrests and convictions (Pet. App. B 12, para. 4B);

(b) that ten days earlier the telephone company stated that a telephone at the Highland Street address was listed to petitioner, but that police investigation revealed petitioner had vacated the address shortly after that date (Pet. App. B 12, para. 4C);

(c) that eleven days earlier, a second informant had said that Wayne Wild admitted being a runner for petitioner and that Wild told the informant that petitioner would soon have 30 pounds of heroin (Pet. App. B 13, para. 4D);

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[2]The information supplied by the local police was a reliable basis for Agent Chown's affidavit. *United States* v. *Ventresca*, 380 U.S. 102, 111; *United States* v. *Luna*, No. 75-1084, C.A.6, decided November 7, 1975; *United States* v. *Stratton*, 453 F.2d 36, 37-38 (C.A. 8), certiorari denied, 405 U.S. 1069.

(d) that ten days earlier named local police officers had followed petitioner from a house-trailer at 3601 Sheffield Avenue, Lot No. 24, to a certain location where he met Valerie Wild; that Valerie Wild was followed to the residence of Wayne Wild; that petitioner was then followed back to the house-trailer (Pet. App. B 12-13, paras. 4E, 4F);

(e) that on the same day the affidavit was executed, a named local police officer observed a meeting between an informant and Valerie Wild at which he gave her twelve $20 bills and one $10 bill, the serial numbers of which had been recorded, and the officer saw her give money to petitioner in exchange for a package of narcotics; that Valerie Wild gave the package of narcotics to the informant, who turned it over to the local police officer (Pet. App. B 13-14, para. G); that a named police officer followed petitioner as he drove from this transaction to the house-trailer on Sheffield Ave (Pet. App. B 14, para. H);

(f) that the telephone number at the house-trailer on Sheffield Ave, Lot 24, was listed to petitioner (Pet. App. B 14, para. 4I);

(g) that the utilities for the house-trailer on Sheffield Ave, Lot 24, were listed in petitioner's name (Pet. App. B 14, para. 4J); and

(h) that petitioner had previously been convicted for importing heroin into the United States and had been sentenced to 5 years' probation (Pet. App. B 14, para. 4K).

Based on the foregoing information, the magistrate authorized a search of petitioner's house-trailer for "narcotics, narcotics paraphernalia, and twelve $20 bills and one $10 bill in United States currency * * *" (petitioner's court of appeals brief, p. 1a).

2. The affidavit was adequate to support the search warrant. There was sufficient information from which the magistrate could conclude that petitioner was dealing in

narcotics from the house-trailer. The affidavit established a connection between the house-trailer and one apparent and one actual narcotics' transaction: first, when petitioner left the trailer to meet with Valerie Wild, who then returned to the residence of Wayne Wild, petitioner's runner; second, when petitioner returned to the house-trailer after selling drugs to the informant. Furthermore, as the court of appeals held (Pet.App. A 5-6), the affidavit indicated that petitioner had kept his supply of narcotics at his former residence, and the magistrate was therefore justified in concluding that petitioner would also keep his narcotics at his new residence, the house-trailer.

Petitioner points out (Pet. 15) that paragraph 4C of the affidavit (Pet. App. B 12) was factually inaccurate, namely, there had been no telephone listed to petitioner at the Highland Street address. The local officer testified that a telephone operator had told him petitioner had a telephone at the Highland Street address (Tr., Proceedings Had on Motions, p. 88), and the district court found that this was, at most, an innocent mistake (*id.*, at p. 169; see also Pet. App. A 4). Since the local officer obtained his information from the telephone company, the affiant was certainly justified in believing a telephone was listed at that address to petitioner, and the magistrate could properly consider it in making his determination of probable cause.[3]

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[3]One other paragraph of the affidavit deserves comment. As noted above, paragraph 4D (Pet. App. B 12) contained a second informant's statement that Wayne Wild said that he was petitioner's runner and that petitioner was expecting a delivery of 30 pounds of heroin. However, the affidavit did not establish "underlying circumstances from which the officer concluded that [this] informant * * * was 'credible' or his information 'reliable'." *Aguilar* v. *Texas*, 378 U.S. 108, 114. Therefore, before this paragraph can properly be considered as contributing to probable cause, it must be determined whether other allegations in the affidavit corroborate this informant's information and therefore make it reliable. *Spinelli* v. *United States*, 393 U.S. 410, 415.

The informant's statements are corroborated: his statement about petitioner's expected receipt of 30 pounds of heroin is corroborated by the identical information supplied by another informant, whose reliability was set out in the affidavit (Pet. App. B 11-12, paras. 4A, 4B). His statement that Wayne Wild was a runner for petitioner is corroborated by the statement that local police personally observed Valerie Wild return to Wayne Wild's residence after a meeting with petitioner (Pet. App. B 12-13, para. 4E), and by the later sale of narcotics by petitioner to a cooperating individual, with Valerie Wild acting as an intermediary (Pet. App. B 13-14, paras. 4G, 4H). Therefore, this information may properly be considered as contributing to probable cause. Cf. *United States* v. *Harris*, 403 U.S. 573. However, as the court of appeals held (Pet. App. A 3), there was sufficient information aside from this paragraph (para. 4D) to establish probable cause to search petitioner's house-trailer.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.